

June 22, 2004

Dear Judy,

I wrote some time ago regarding the "rules & procedures for public participation" on the inside front cover of the Town Council agenda, expressing my opinion that the rules were unconstitutional as written. I have done further research since that time and believe that the current wording is also contrary to the Sunshine Law in certain paragraphs.

Utilizing the Attorney General's Government-in-the-Sunshine Manual and case law from the Florida higher courts, I have written a rough draft (attached) of my proposed revised rules, which I believe could help correct the situation. I would like to see my proposed revision of the rules of conduct placed on the Council agenda for discussion.

The following serves as an explanation of the basis my proposed changes in the attached draft:

With reference to the consent agenda, there is nothing in law that permits a municipal government to exclude the public from speaking on these items. As the Florida Supreme Court stated, "Under the Sunshine Law, a meeting is either fully open or fully closed; there are no intermediate categories." Neu v. Miami Herald Pub. Co., 462 So. 2d 821 (Fla. 1985). According to the Attorney General, "[t]he public may not be deprived of the right to be present and to be heard at all deliberations where decisions affecting the public are being made." (Citing to the Florida Supreme Court in Board of Public Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969)).

There are items on the consent agenda that affect the public, not least of which are site plan committee recommendations. Currently, the "rules" state that "no public input is received on these items." This wording is clearly contrary to the law and needs to be amended to allow public comment. Moreover, site plan approval should not be on the consent agenda in the first place. The Snyder decision specifically states that site plan approval is a quasi-judicial item ("rezoning, special exception, conditional use permit, variance, site plan approval, etc."). Board of County Commissioners Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993).

There is nothing in the Snyder decision that places a time limit on the public's input or prevents public comment during the open

public meeting on agenda items that are not quasi-judicial. The Snyder decision simply establishes which decisions are quasi-judicial and sets the evidentiary rules for such hearings, stating, "in order to sustain the board's action, upon review by certiorari in the circuit court it must be shown that there was competent substantial evidence presented to the board to support its ruling." Id.

However, the Attorney General does state that generally, in order to run a timely meeting, the length of time an individual is allowed to speak may be limited, but recommends that when a large number of people attend and wish to speak, it can be requested that a representative of each side of the issue speak rather than every one present. Recently, groups of residents have asked to appoint a spokesperson, who would be given additional time to speak on an issue, but this has not been allowed. It is intrinsically unfair to limit public input to disjointed three minute segments, while the petitioner is permitted to make a lengthy presentation and rebuttal. It would be more efficient and balanced to give additional time to a few spokespersons and limit any individual who is not part of a group to the standard three minutes. The Attorney General recommends that this be done and there is no lawful reason to prohibit it. Therefore, I have included language to that effect in my draft of proposed new rules.

The rules as they are written make no provision whatsoever for the monthly open public meeting, so I have also included a paragraph to this end. Although the wording in the Charter makes no sense, stating that the time period for the open public meeting shall be "at least thirty (30) minutes or until all speakers are heard, whichever occurs first", the intent is clearly to set aside thirty minutes unless there is no one left to speak. If there are few speakers present, which could be ascertained by a show of hands, there seems no valid reason to adhere to the three minute time limit.

Finally, I have amended the "decorum" paragraph to "rules of orderly conduct", applicable to all present, and tried to narrowly construe what conduct would be agreed by all as unreasonable and/or disorderly in a way not subject to much interpretation, as mandated by the United States Supreme Court, which demands very strict scrutiny of any restrictions of the citizens' most basic First Amendment rights.

"Content-neutral time, place and manner restrictions are permissible if they are narrowly drawn to achieve a significant

governmental interest and if they allow communication through other channels. Content-based exclusions must be narrowly tailored to effectuate a compelling governmental interest." Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989); see also: Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983).

I also have additional concerns over the practice of attaching last minute items to the agenda, particularly when they may be of substantial public interest, without amending the agenda on-line. While I am not suggesting that this is illegal, it certainly defeats the notice requirement of the Sunshine Law and effectively forecloses public input on such issues. This is further aggravated when Council discusses such issues by reference to the item number, instead of title or subject matter, leaving the viewing public to try and glean what is going on from the context of the discussion.

To paraphrase the Florida Supreme Court, "Government, more so now, than ever before, should be responsive to the wishes of the public." "...open meetings instill confidence in government. The taxpayer deserves an opportunity to express his views and have them considered in the decision-making process ..." "No governmental board is infallible and it is foolish to assume that those who are elected or appointed to office have any superior knowledge concerning any government problem. Every person charged with the administration of any governmental activity must rely upon suggestions and ideas advanced by other knowledgeable and interested persons. As more people participate in governmental activities, the decision-making process will be improved." "The statute should be construed so as to frustrate all evasive devices." Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974) (referring to the Sunshine Law.)

"One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made." Board of Pub. Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969).

My apologies for the length of this letter, but I feel this is a matter of the utmost importance, which needs to be addressed and corrected promptly. I hope you will agree to place this issue on the agenda for Council discussion as soon as possible. (See

attached draft.)

Sincerely,

Julie Aitken

(Attorney General's Sunshine Manual can be found at:
<http://myfloridalegal.com/sunshine>).

I. WHO MAY SPEAK

Any individual who wishes to address the Council on any subject within the scope of the Council's authority, may do so providing it is accomplished in an orderly manner and in accordance with the procedures outlined below:

A. SPEAKING ON ITEMS ON THE AGENDA

1. Consent Agenda Items. These are items which the Council does not need to discuss individually and which may be voted on as a group. If an item is removed from the consent agenda for Council discussion, public input relevant to that item may also be received. Those items not removed from the consent agenda for Council discussion are not subject to public input.
2. Public Hearing Items. Any individual may address the Council on items listed under this portion of the agenda.
 - a. A name/address slip must be completed and given to the Town Clerk prior to or immediately after addressing the Council.
 - (1) Name/address slips are located in the Meeting Room lobby.
3. When one or more large groups of people attend and wish to speak for or against a particular agenda item, each group will identify itself to Council and may select a representative to act as a spokesperson on behalf of that group. Each spokesperson will be given proportionately more time to speak, provided that the group agrees that no further members will speak. Individuals who are not part of any group may speak for the time period set for individuals.

B. SPEAKING ON ITEMS NOT ON THE AGENDA

1. Individuals who wish to address Council on any subject not listed on the Public Hearing portion of the agenda may speak under any Councilmember's name after receiving prior approval from said Councilmember.
 - a. Said Councilmember will inform the Council of his/her allowing an individual to speak under his/her name.

C. OPEN PUBLIC MEETING

1. At the first Council meeting of each month, any

individual may address the Council on any subject, providing that subject is not on the agenda.

2. The time allowed for the Open Public Meeting will be 30 minutes or until all those wishing to speak have had the opportunity to do so, which ever comes sooner.
 - a. When there is a large number of speakers, there will be a strict time limit of three minutes per speaker. Speakers will be taken in turn, beginning with the those in the first row of seating, then taken row by row, on a first come first served basis. If the 30 minutes has elapsed, it shall be at the Council's discretion whether the time allotted for the Open Public Meeting should be extended to allow further speakers.
 - b. When there is a small number of speakers, additional time per speaker may be allowed, providing that each individual wishing to speak has the opportunity to do so within the 30 minute time period.

II. ADDRESSING COUNCIL, MANNER, TIME

The length of time each individual may speak must be limited in the interest of order and conduct of the business at hand. If required, the Mayor will set a **reasonable** time limit at his/her discretion. Each individual who addresses the Council shall present a name/address slip to the Town Clerk, step up to the lectern and clearly give his/her name and address for the record.

III. RULES OF ORDERLY CONDUCT

Each individual attending a Council Meeting must confine his/her comments or opinions to those relevant to the agenda item under discussion. Any individual who engages in behavior that causes unreasonable delays or disruptions of the Council Meeting or speaks in a lewd, blasphemous or threatening manner at any time during the meeting, may, if they do not promptly desist, be removed from the meeting room by the Sergeant-at-Arms at the direction of the Mayor.